Supreme Court, U.S.
FILED
OCT 24 1994
THE CLERK

No. 94-48

In the Supreme Court of the United States

OCTOBER TERM, 1994

KING FISHER MARINE SERVICE, INC., PETITIONER

v.

ROGELIO PEREZ AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Fenelon v. *Duplessis*, 997 F.2d 880, reh'g en banc denied, 3 F.3d 441 (5th Cir. 1993)	2, 5, 6
Johnson v. *Carter*, 983 F.2d 1316 (4th Cir.) cert. denied, 114 S. Ct. 57 (1993)	6
Mitchell v. *Carlson*, 896 F.2d 128 (5th Cir. 1990)	5
Westfall v. *Erwin*, 484 U.S. 292 (1988)	2

Statutes, regulation and rule:

Endangered Species Act of 1973, 16 U.S.C. 1536	4
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563	2
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	2
28 U.S.C. 2679(b)(1)	3
28 U.S.C. 2679(d)	3
28 U.S.C. 2679(d)(1)	3
28 U.S.C. 2679(d)(2)	3, 4
28 C.F.R. 15.3	3
Fed. R. Civ. P. 54(b)	5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-48

KING FISHER MARINE SERVICE, INC., PETITIONER

v.

ROGELIO PEREZ AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 20 F.3d 466 (Table). The opinion of the district court (Pet. App. A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1994. The petition for a writ of certiorari was filed on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' determination that the Attorney General's certification that a federal employee was acting within the scope of employment is conclusive for purposes of substitution of the United States as the defendant in a pending civil action. The court of appeals followed its prior unpublished decision in *Fenelon* v. *Duplessis*, 997 F.2d 880 (Table), reh'g en banc denied, 3 F.3d 441 (1993) (Table), and concluded that the Attorney General's certification is not subject to judicial review.

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Westfall Act provides immunity to government employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant. The suit then proceeds against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

The Westfall Act accomplishes this result through a statutory provision that states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of

> this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).[1] The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). The Attorney General has delegated the authority to certify that an employee was acting within the scope of the employee's office or employment to the United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3.

2. Petitioner filed this action in the District Court for Galveston County, Texas, 10th Judicial District, against respondent Rogelio Perez, an employee of the United States Fish and Wildlife Service, alleging intentional interference with petitioner's contractual rights. Petitioner contended that Perez acted tortiously

---

[1] Subsection (d) also authorizes the United States to remove actions from state court, stating:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d)(2).

in alerting the Army Corps of Engineers about the presence of migratory birds at a site where petitioner was conducting dredging operations for the Corps of Engineers and in requesting the Corps of Engineers to suspend dredging operations while the birds remained at the site in order to avoid a possible violation of the Endangered Species Act of 1973, 16 U.S.C. 1536. Petitioner alleged that respondent's actions caused the Corps of Engineers to cancel its contract with petitioner.

Pursuant to the Westfall Act, the United States Attorney certified on behalf of the Attorney General that Perez was acting within the scope of his office or employment at the time of the incident that gave rise to petitioner's claim. Perez then filed a petition to remove the action to the United States District Court for the Southern District of Texas. See 28 U.S.C. 2679(d)(2). Petitioner filed a motion asserting several grounds to remand the action to state court, including a claim that Perez was not acting within the scope of his employment. In that motion, petitioner also sought discovery from respondents on the issue of scope of employment. Perez moved for a protective order against such discovery. The government also moved to substitute the United States for Perez as defendant, and the district court granted that motion. Petitioner subsequently filed a motion for reconsideration of the substitution order.

The district court denied the motion to reconsider on the ground that a certification by the Attorney General that an employee was acting within the scope of office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. A15-A16. Because petitioner's request for discovery pertained solely to its motion challenging the

scope-of-employment certification, the district court concluded that its denial of the motion for reconsideration obviated the need for a protective order, which it therefore denied. *Id.* at A16. After substituting the United States for Perez, the court entered a final judgment under Fed. R. Civ. P. 54(b) dismissing Perez from the action. See Pet. 10-11. The United States then moved to dismiss the complaint for lack of jurisdiction based upon petitioner's failure to file an administrative claim with the Fish and Wildlife Service. On June 17, 1993, the district court granted the motion and entered final judgment for the United States.

Petitioner appealed. In a per curiam order, the court of appeals affirmed the order of the district court that substituted the United States as defendant for Perez. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. A2-A3. See *Mitchell* v. *Carlson*, 896 F.2d 128, 133 (5th Cir. 1990); *Fenelon* v. *Duplessis*, 997 F.2d 880 (Table), reh'g en banc denied, 3 F.3d 441 (5th Cir. 1993) (Table).

DISCUSSION

Petitioner challenges the court of appeals' determination that Perez was acting within the scope of his employment for purposes of the Westfall Act at the time of the incident from which its claim arises. Petitioner specifically takes issue with the court of appeals' ruling that the Attorney General's scope-of-employment certification is conclusive under the Westfall Act. Pet. 12-43.

The Westfall Act does not expressly provide for judicial review of the Attorney General's certification

decisions. Immediately after enactment of the Westfall Act, the United States took the position that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The United States subsequently reconsidered its position, however, and concluded that the certification decision is reviewable. See U.S. Br. in Opp. in *Lehtinen* v. *S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); U.S. Br. in Opp. in *Johnson* v. *Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-1591).

The question presented in this petition is also presented in *Gutierrez de Martinez* v. *Lamagno*, petition for cert. pending, No. 94-167. The United States has suggested that that petition should be granted. See U.S. Br. in No. 94-167. If the Court decides to grant the petition in *Gutierrez de Martinez*, its decision in that case would control the disposition of this case. We therefore suggest that the Court hold the petition in this case pending the decision in *Gutierrez de Martinez* and then dispose of the petition accordingly.[2]

---

[2] We believe that the Fourth Circuit's decision in *Gutierrez de Martinez* presents a preferable vehicle for this Court's consideration of the issue. The *Gutierrez de Martinez* decision rests on the Fourth Circuit's binding en banc precedent in *Johnson* v. *Carter*, 983 F.2d 1316, 1319-1321, cert. denied, 114 S. Ct. 57 (1993). The Fifth Circuit's law on the matter, however, is unsettled. The Fifth Circuit's decision in this case relies principally on that court's prior unpublished decision in *Fenelon, supra*. See Pet. App. A3, A4-A11. The Circuit is currently reconsidering the issue en banc in *Garcia* v. *United States*, No. 92-8490 (5th Cir.) (argued Sept. 12, 1994).

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Gutierrez de Martinez* v. *Lamagno*, No. 94-167, and disposed of in accordance with the decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

OCTOBER 1994